

No. 83-1565

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ALEXANDER L. STEVAS,  
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IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1982

BERTIE L. LOMAS,

*Petitioner*

*v.*

NORTHWESTERN LEHIGH SCHOOL DISTRICT,  
BOARD OF SCHOOL DIRECTORS OF  
NORTHWESTERN LEHIGH SCHOOL DISTRICT,  
HARRY E. BURGER, SUPERINTENDENT OF  
NORTHWESTERN LEHIGH SCHOOL DISTRICT,  
AND CARL H. BETZ, GENE E. HANDWERK,  
VERDIE BAILEY, RUSSELL OSWALD, ORRIN  
H. FINK, GEORGE F. SOUTHWORTH, CARL D. SNYDER,  
RALPH H. KRESSLEY, FORREST A. WESSNER, JR.,  
KENNETH A. MORTON AND WILLARD A. KISTLER,  
ALL IN THEIR OFFICIAL CAPACITY AS MEMBERS  
OF THE BOARD OF SCHOOL DIRECTORS OF THE  
NORTHWESTERN LEHIGH SCHOOL DISTRICT,

*Respondents*

Petition for Writ of Certiorari to the United States Court  
of Appeals for the Third Circuit.

**RESPONDENTS' BRIEF IN OPPOSITION**

John E. Freund, III, Esquire  
KING, MCCARDLE, HERMAN  
& FREUND  
112 N. Sixth Street  
P.O. Box 449  
Allentown, PA 18105  
(215) 432-4506

*Attorney for Respondents*

**COUNTER-STATEMENT  
OF QUESTION PRESENTED**

Whether the United States District Court for the Eastern District of Pennsylvania and the Court of Appeals for the Third Circuit erred in finding that the petitioner had a full and fair opportunity to litigate her federal civil rights claim in prior state proceedings, thereby holding that the doctrine of collateral estoppel, applied through the full faith and credit statute, required that preclusive effect be given to the state court decision.

## TABLE OF CONTENTS

	Page
Counter-Statement of Question Presented . . . . .	i
Constitutional and Statutory Provisions . . . . .	2
Jurisdiction . . . . .	4
Counter-Statement of Case . . . . .	5
Reasons for Denying the Writ . . . . .	7
I. The Dismissal of the Petitioner's Action on Preclusion Grounds Comports with Case Law of this Court as to Collateral Estoppel	7
Conclusion . . . . .	9

## TABLE OF AUTHORITIES

Cases	Pages
<i>Allen v. McCurry</i> , 449 U.S. 90 (1982) .....	7
<i>Davis v. United States Steel Supply, Division of United States Steel Corporation</i> , 688 F.2d 166 (1982) cert. denied ____ U.S. ____, 103 S. Ct. 256 .....	9
<i>Kremer v. Chemical Construction Corp.</i> , 456 U.S. 461 (1982) .....	7, 8
<i>Lomas v. Board of School Directors of Northwestern Lehigh School District</i> , 66 Pa. Cmwlth. 421, 444 A.2d 1319 (1982) .....	6, 7, 8
<i>Migra v. Warren City School District Board of Edu- cation, et al.</i> , 52 U.S.L.W. 4151 (1984) .....	8
<i>Switlik v. Hardwicke</i> , 651 F.2d 852 (3d Cir. 1981), cert. denied 454 U.S. 1064 .....	8
<b>Statutes:</b>	
U.S. Const. Amend XIV .....	5, 8
28 U.S.C. §1254(1) .....	4
28 U.S.C. §1343 .....	5
28 U.S.C. §1738 .....	8
42 U.S.C. §1983 .....	5, 6
42 U.S.C. §1988 .....	5



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**Respondents' Brief in Opposition**

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## CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 28 of the United States Code Section 1254(1) provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decrees;

. . . . .

Chapter 28 of the United States Code Section 1343(a)(3), (4) provides:

The district courts shall have original jurisdiction of any civil action by law to be commenced by any person;

. . . . .

- (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citi-

zens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Chapter 28 of the United States Code Section 1738 provides:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory, Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Chapter 42 of the United States Code Section 1983 provides:

Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party in-



jured in an action at law, suit or equity, or other proper proceeding for redress.

Chapter 42 of the United States Code Section 1988 provides:

. . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

### **JURISDICTION**

Petitioner claims jurisdiction pursuant to 28 U.S.C. §1254(1).

## COUNTER STATEMENT OF THE CASE

The petitioner instituted this federal action on November 10, 1981, claiming damages for violation of Title 42 of the United States Code, Sections 1983 and 1988 and alleging jurisdiction based on Title 28 of the United States Code, Section 1343. The petitioner's alleged cause of action arises out of her demotion from the position of elementary school principal to classroom teacher at Northwestern Lehigh School District, Lehigh County, Pennsylvania, in March, 1980. The petitioner alleges that the procedures employed by the respondents to demote her from the position of elementary school principal to a teaching position were illegal, arbitrary and discriminatory in violation of her right to due process protected by the Fourteenth Amendment and Title 42, United States Code, Section 1983. Specifically, she contends that her demotion actually took place prior to the formulation of any charges or hearing as a result of "secret" meetings during which the respondents heard unrecorded testimony and to which meetings the petitioner neither had notice nor invitation; that petitioner received no notice that her conduct was unsatisfactory prior to the institution of demotion proceedings against her, and that the hearing conducted under the provisions of the Pennsylvania Public School Code was not fair and impartial in that petitioner's counsel was denied the opportunity to examine the respondent School Board members concerning their possible bias and the deliberations of the respondent School Board were conducted privately and no record was made thereof.

Prior to this federal action, the petitioner challenged her demotion from the position of elementary school principal to a teaching position in the Courts of the Commonwealth of Pennsylvania. In the state proceedings, she raised due process claims identical to those asserted in the present action. By opinion and order dated May 7, 1982, the Pennsylvania Commonwealth Court affirmed

the order of the Secretary of Education upholding the action of the respondent Board of School Directors of Northwestern Lehigh School District with only a minor modification. *Lomas v. Board of School Directors of Northwestern Lehigh School District*, 66 Pa. Cmwlth. 421, 444 A.2d 1319 (1982). Significantly, the Commonwealth Court decided all of the due process claims raised by the petitioner adversely to her. *Id.* On May 20, 1982, the Commonwealth Court denied the petitioner's application for argument and on September 30, 1982, the Pennsylvania Supreme Court denied the petitioner's petition for allowance of appeal.

Following the completion of the state court proceedings, the respondents supplemented a previously filed motion for summary judgment submitting that the petitioner was precluded from relitigating in the present 42 U.S.C. 1983 action, the due process claims and issues pressed before and decided by the Pennsylvania Commonwealth Court. By Order dated March 9, 1983, the United States District Court for the Eastern District of Pennsylvania, per the Honorable Daniel H. Huyett, 3rd, granted the respondent's motion for summary judgment on collateral estoppel grounds and dismissed the petitioner's action with prejudice. On November 2, 1983, the United States Court of Appeals for the Third Circuit affirmed the District Court's decision and on November 28, 1983, denied a petition for rehearing. These opinions have been appended to the petition for writ of certiorari.

The petitioner now seeks a writ of certiorari. She contends that the lower courts committed a legal error in dismissing her action on preclusion grounds because she was denied a full and fair opportunity to litigate her federal claims in the Pennsylvania Courts. For the reasons set forth below, respondents respectfully request that this Honorable Court deny the petition for writ of certiorari.

## REASONS FOR DENYING THE WRIT

THE DISMISSAL OF THE PETITIONER'S ACTION ON PRECLUSION GROUNDS COMPORTS WITH CASE LAW OF THIS COURT AS TO COLLATERAL ESTOPPEL.

The petitioner correctly points out that "the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier decision." *Allen v. McCurry*, 449 U.S. 90 at 95 (1982). See also, *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, (1982). However, the petition's position that she was not afforded a "full and fair opportunity" to litigate her due process claims in the prior state proceedings is not supported by the facts or the law.

The petitioner freely submitted her due process claims to the Pennsylvania Commonwealth Court prior to the institution of this federal action. She fully briefed and argued these contentions before the state tribunal. As the United States District Court keenly observed, the opinion of the Commonwealth Court reveals that the court assumed the truth of the facts which the Appellant seeks to establish in the present case, but nevertheless determined that the hearing had provided the petitioner with due process.

Specifically, the Commonwealth Court assumed the truth of the petitioner's allegations that the respondent School Board members had gathered information regarding her professional performance at "secret" pre-hearing meetings at which the respondent heard unrecorded testimony and to which the petitioner was not invited and that the respondents were biased by this information. *Lomas*, supra. 444 A.2d 1324-1325. Yet, the Court held that the petitioner was not deprived of her constitutionally protected right to due process of the law by the pre-hearing information gathering activities of the respondents. The Court determined that the peti-

tioner had "a thorough, fair and impartial hearing," stressing that the petitioner was well represented throughout the proceedings by able counsel and that the respondent board was instructed at some length by its specially appointed solicitor to confine its deliberations to the evidence presented at the public hearing. *Lomas*, supra. 444 A.2d at 1325.

In order to qualify for the full faith and credit pursuant to 28 U.S.C. § 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause. *Kremer*, supra. Accordingly, where a plaintiff's constitutional claims were not adequately treated by the hearing court or agency, but the plaintiff had freely and forcefully pressed these claims before the state appellate courts, he or she will be deemed to have had a "full and fair opportunity to litigate." *Switlik v. Hardwicke Co., Inc.*, 651 F.2d 852 (3d Cir., 1981) cert. denied 454 U.S. 1064. Thus, there is no merit to the petitioner's contention that she was denied a "full and fair opportunity to litigate" as a result of the lack of discovery procedures and the alleged restrictions placed on her in developing a record in the state evidentiary proceeding. A review of the briefs and opinion of the Pennsylvania Commonwealth Court reveal the petitioner vigorously pressed her due process claims before the Appellate Court. Had the Commonwealth Court seen the need for additional evidence, it would have remanded the matter for further proceedings. *Switlik*, supra.

The Full Faith and Credit Statute, 28 U.S.C. § 1738 "requires federal courts to give the same preclusive effect to state court judgments as those judgments would have in the courts of the state from which the judgments emerged." *Kremer*, supra. at 466. See also *Migra v. Warren City School District Board of Education, et al.*, 52 U.S.L.W. 4151 (1984) (where court held that State court judgments may bar both issues which were actually litigated as well as those issues which could have



been raised but were not if the courts of the state from which the judgment emerged would give the judgment such preclusive effect.) In *Davis v. United States Steel Supply, Division of United States Steel Corporation*, 688 F.2d 166 (1982) cert. denied \_\_\_\_ U.S. \_\_\_\_, 103 S. Ct. 256, the court held that State court judgments reviewing administrative proceedings, such as that in the present case, would be given preclusive effect by the Pennsylvania courts, and therefore must be accorded the same effect by the federal courts.

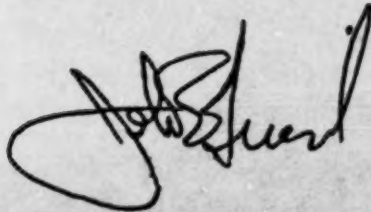
### CONCLUSION

In light of the foregoing, it is respectfully submitted that the petition for writ of certiorari of Bertie L. Lomas should be denied.

Dated:

Respectfully submitted;

KING, MCCARDLE, HERMAN & FREUND



By

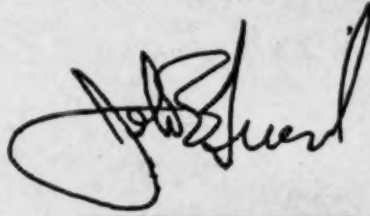
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John E. Freund, III, Esquire  
112 N. Sixth Street  
P.O. Box 449  
Allentown, PA 18105  
(215) 432-4506

*Attorney for Respondents*

**PROOF OF SERVICE**

I, JOHN E. FREUND, III, Attorney for respondents, herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 25th day of April, 1984, three copies of the foregoing brief in opposition to petition for certiorari were mailed by first class mail to Bertie L. Lomas, petitioner, 1810 Eastman Avenue, Bethlehem, Pennsylvania 18018. I further certify that all parties required to be served have been served.

A handwritten signature in black ink, appearing to read "John E. Freund, III". The signature is stylized with a large, looping initial "J" and a long, sweeping underline.

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John E. Freund, III, Esq.  
112 N. Sixth Street  
P.O. Box 449  
Allentown, PA 18105